

GUGLIELMO & ASSOCIATES
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2011 JAN 19 P 3 11

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Erick Acacio Gurule & Darci Gurule

Plaintiff,

vs.

Guglielmo & Associates

And

Discover Bank

Defendant(s).

Case No 2:10-cv- 2029-KJD-GWF

REPLY TO OPPOSITION TO MOTION
TO DISMISS COUNT 1: VIOLATION OF
FAIR DEBT COLLECTION PRACTICES
ACT

COMES NOW, Defendant, Guglielmo & Associates, by and through undersigned counsel
hereby replies to Defendants' Opposition in this matter. This reply is based upon the attached
Memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FAILURE TO STATE A CLAIM

There is no dispute of fact, as contained in the Gurule's Opposition, that Guglielmo &
Associates mailed the dunning letter on May 5, 2010, or that the Gurules received it on June 1,
2010. Based upon their exhibits, there is no dispute that the Gurules sent a demand for
verification which far exceeded any entitlement of law, or that Plaintiff filed suit on July 13,
2010. However, they err as a matter of law: The legal obligation under 15 USC 1692(g) of the

1 Debt Collector, here Guglielmo & Associates, is to send the letter notifying the Debtors of their
 2 rights, and that there is absolutely no further obligation to ensure that it is received by the debtors,
 3 and thus no tolling of the 30 day time period to account for when they checked their mail. *Mahon*
 4 *v. Credit Bureau of Placer County Incorporated*, 171 f.3d 1197 (9th CA 1999), applying the Mail
 5 Box Rule to 1692(g) disputes. This dispute originates from the Defendant's independent decision
 6 not to have their mail delivered to their residence, or to check their Post Office Box regularly,
 7 neither of which constitutes a bad act or omission by Guglielmo & Associates.
 8

9
 10 Therefore, as there is no basis of legal liability for the acts of which the Gurules complain
 11 there is also no way they could. As to their arguments regarding overshadowing, this proposed
 12 claim is subject to the same analysis: Guglielmo and Associates were under an obligation to send
 13 the notice, and to refrain from undercutting or overshadowing the rights of the Gurules within
 14 that 30 day period. It is undisputed that Guglielmo & Associates took no collection actions
 15 during the 30 day period. As the facts are before the Court, pled by the Defendants, and not a
 16 byproduct of notice pleading or legal claims analysis, Guglielmo & Associates respectfully
 17 request the dismissal of the action with prejudice to prevent vexatious litigation.
 18

19 II. ROOKER FELDMAN DOCTRINE

20 The intent of the Rooker-Feldman doctrine is to prevent unhappy state court litigants from
 21 filing suit in Federal District Court, creating a *de facto* appeal of the state court action. *Rooker v.*
 22 *Fidelity Trust Co.*, 263 U.S. 413 (1923), *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).
 23 The Gurules here argue this is a "collateral attack" on the state court judgment, and it is the state
 24 court judgment which is "void ab initio." As the State Court has concurrent jurisdiction with the
 25 federal court actions over the Fair Debt Collections Practices Act, 15 USC 1692, this claim falls
 26 squarely under the Rooker Feldman doctrine. In their argument, the Gurules admit to having
 27
 28

1 commenced parallel litigation in an attempt to undo an anticipated loss in state court on the
2 merits, and a loss on their counterclaim. *Exxon Mobile Corp. v. Saudi Basic Industries Corp.* 544
3 US 280 (2005), *Johnson v. de Grandy*, 512 US 997, (1994). Therefore, Plaintiff respectfully
4 requests that the Plaintiff's Complaint be DISMISSED, WITH PREJUDICE. DATED
5 01/17/2011.
6

7 GUGLIELMO & ASSOCIATES

8 /s/ R. Ohlinger
9 Original Signature

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11

12 Roberta Ohlinger
13 Nevada Bar #10946
14 3376 S Eastern Avenue Ste 188-A
15 Las Vegas NV 89169
16 (702)889-6009
17 Attorney for Defendant Guglielmo & Associates

18 **CERTIFICATE OF SERVICE**

19 I hereby certify that on this 17th day of January 2011, I served the foregoing REPLY TO
20 OPPOSITION by depositing a true copy thereof into the U.S. Mails, postage prepaid and
21 addressed to the following at their last known addresses:

22 Erick Acacio Gurule & Darci Gurule
23 Po Box 97551
24 Las Vegas NV 89193-7551

25 /s/ R. Ohlinger
26
27
28